SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 454

JAY B. PHELPS,

Appellant,

vs.

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK AND STATE BOARD OF EDUCATION,

Appellees.

APPELLEE'S STATEMENT PURSUANT TO RULE 12, PARAGRAPH "3", OPPOSING JURISDICTION, WITH MOTION TO DISMISS AND, IN THE ALTERNATIVE, MOTION TO AFFIRM.

The appellee, Board of Education of The Town of West New York, pursuant to the provisions of Rule 12, Paragraph 3 of this Court, writes down the following matters and grounds making against the jurisdiction of this Court asserted by appellant.

I.

The appeal in the instant case presents for review, the decision of a State court, construing a State statute and determining that it is not violative of the State Constitution. The gist of the State court's opinion involves purely

a matter of local law. A Federal question was not decided by the State Court, nor was its decision necessary to a determination of the cause.

The opinion of the New Jersey Supreme Court is officially reported in 115 N. J. L. 310, and was affirmed by the New Jersey Court of Errors and Appeals in 116 N. J. L. 412.

The Statutes involved are P. L. 1909, p. 398, being Chapter 243 of the New Jersey Public Laws of 1909 (the so-called Teacher's Tenure Act) and P. L. 1933, p. 24, being Chapter 12 of the New Jersey Public Laws of 1933, which latter Act the New Jersey Court held in its opinion, to have modified and repealed part of the 1909 Tenure Act.

The 1909 Statute reads as follows:

> "A Supplement to an act entitled "An act to establish a thorough and efficient system of free public schools and to provide for the maintenance, management and support thereof," approved October nineteenth, one thousand nine hundred and three.
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> BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:
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> 1. The service of all teachers, principals, supervising principals of the public schools in any school district of this State shall be during good behavior and efficiency, after the expiration of a period of employment of three consecutive years in that district, unless a shorter period is fixed by the employing board; provided, that the time any teacher, principal, supervising principal has taught in the district in which he or she is employed at the time this act shall go into effect, shall be counted in determining such period of employment. No principal or teacher shall be dismissed or subjected to reduction of salary in said school district except for inefficiency, incapacity, conduct unbecoming a teacher or other just cause, and after a written charge of the cause or causes shall have been preferred against him or her, signed by the person or persons

making the same, and filed with the secretary or clerk of the Board of Education having charge of the school in which the service is being rendered, and after the charge shall have been examined into and found true in fact by said Board of Education, upon reasonable notice to the person charged, who may be represented by counsel at the hearing. Charges may be filed by any person, whether a member of said school board or not.

2. Said Board of Education shall have power to issue writs af subpœna on behalf of either party to compel attendance of witnesses to testify before said board in the matter under investigation, which subpœna shall be issued under the seal of said board and be signed by the secretary or clerk thereof, and shall be served in the same manner as subpœnas issued out of the Courts of Common Pleas of this State, and every person who refuses or neglects to obey the command of such a writ, or, who, after appearing, refuses to be sworn and testify, shall in either event be liable to a penalty of fifty dollars, to be sued for in the name of said board in any court of competent jurisdiction, which penalty when collected shall be paid to the treasurer or custodian of moneys of said board. Any member of said board is hereby authorized to administer oaths to such witnesses as may appear or be brought before it, and any person who shall have been so sworn and who shall testify falsely, shall be guilty of perjury.

3. Nothing herein contained shall be held to limit the right of any school board to reduce the number of principals or teachers employed in any school district when such reduction shall be due to a natural diminution of the number of pupils in said school district; and, provided further, that the service of any principal or teacher may be terminated without charge or trial who is not the holder of a proper teacher's certificate in full force and effect.

4. This act shall take effect September first, one thousand nine hundred and nine.

Approved April 21, 1909."

The 1933 Statute reads as follows:

"AN ACT respecting the salaries or compensation of officers and employees of and persons holding positions in the several school districts of this State.

WHEREAS, due to present economic conditions, an emergency exists which requires that the board of education of every school district in this State be enabled to fix and determine, by resolution, the amount of salary or compenastion to be paid to officers and employees of and persons holding positions in any such school district; therefore,

BE IT ENACTED BY THE SENATE AND GENERAL ASSEMBLY OF THE STATE OF NEW JERSEY:

1. The board of education of every school district in this State shall have full authority, by resolution, to fix and determine the salaries and compensation to be paid to officers and employees of and persons holding positions in any such school district, between the first day of July, one thousand nine hundred and thirty-three, and the first day of July, one thousand nine hundred and thirty-four, notwithstanding any such person be under tenure or not; *Provided, However,* that no salary or compensation of any officer or employee of or person holding a position in any school district shall be increased between the first day of July, one thousand nine hundred and thirty-three, and the first day of July, one thousand nine hundred and thirty-four; *And Provided, Further,* that if any such person be a member of the Teachers' Pension and Annuity Fund of the State of New Jersey, or any employees' pension fund, such person may continue to pay, or cause to be paid, into such pension fund the same amount as if such salary or compensation had not been changed, and upon the death or retirement of such member, he or his beneficiary shall be entitled to the same benefits as if his salary or compensation had not been changed; *And Provided, Further,* that in fixing salaries or compensation there shall be no discrimination among or

between individuals in the same class of service; provided, however, that the existing minimum salary of teachers of seventy dollars per month shall not be changed.

2. Nothing in this act contained shall be construed to effect or impair the continuity of position or employment under any tenure of office statute.

3. This act shall take effect immediately.

Approved February 4, 1933."

The resolution adopted by appellee, pursuant to the authority of the 1933 Act, reads as follows:

"RESOLVED, That between July 1, 1933, and July 1, 1934, the salaries of the Superintendent of Schools and of all principals, supervisors and teachers in the West New York School System be and they are hereby reduced as follows:

All salaries from $1200 to $1999 per annum reduced ten per cent;

All salaries from $2000 to $2499 per annum reduced eleven per cent;

All salaries from $2500 to $2999 per annum reduced twelve per cent;

All salaries from $3000 to $3499 per annum reduced thirteen per cent;

All salaries from $3500 to $3999 per annum reduced fourteen per cent;

All salaries from $4000 to $5600 per annum reduced fifteen per cent;

all figures being inclusive; provided, however, that the salary of any elementary school teacher shall not be reduced below the minimum of $1200 per annum, and the salary of any high school teacher shall not be reduced below the minimum of $1600 per annum.

(Sgd.) ARTHUR H. EINBECK.

Dated, June 23, 1933."

A perusal of the State Court's opinion indicates that it construed the 1909 Act, not as conferring irrevocably vested contractual obligations on the school teachers of New Jersey, but on the contrary, that the statute established "a legislative status for teachers" and that the status of tenure teachers is in "essence dependent on a statute * * * which the legislature at will may abolish, or whose emoluments it may change"; that the 1933 Act constitutes "an implied partial repealer or amendment to the tenure act of 1909" and is not repugnant to the provisions of the Constitution of the State of New Jersey inhibiting the impairment of obligations of contract.

This interpretation by the State Court, as to the meaning and effect to be attributed to the tenure act of 1909 and its elucidation of the status of teachers in New Jersey thereunder, makes manifest that the 1909 Act did not create a *contractual* obligation and hence there could be no constitutional impairment by the subsequent legislation of 1933; because no *contract* in law or fact, had ever existed.

This holding by the State Court made it entirely unnecessary to consider or determine the question whether the contract clause of the Federal Constitution had been violated by the 1933 statute.

Such interpretation by the New Jersey courts of a State Statute will be accepted by this Court and does not raise a Federal question properly reviewable by this Court.

First National Bank of Garnett v. *Ayers*, 160 U. S. 660;
Carstairs v. *Cochran*, 193 U. S., page 10;
Tampa Waterworks Company v. *City of Tampa*, 199 U. S. 241;
Quong Ham Wah Company v. *Industrial Accident Company*, 255 U. S. 445;
Terrace v. *Thompson*, 263 U. S. 197;
Supreme Lodge, etc. v. *Meyer*, 265 U. S. 30;
American Ry. Express Co. v. *Commonwealth of Kentucky*, 273 U. S. 269.

To give this Court jurisdiction it must appear affirmatively, not only that the Federal question was presented for decision, but that its decision was necessary to a determination of the cause, and that it was actually decided, or that the judgment could not have been given without deciding it.

Cleveland & P. R. Co. v. *Cleveland,* 235 U. S. 50;
Parker v. *McLain,* 237 U. S. 469.

In *Bachtel* v. *Wilson,* 204 U. S. 36, this Court held that before it can pronounce a judgment of a State Court to be "in conflict with the Federal Constitution, it must be made to appear that its decision was one necessarily in conflict therewith, and not that possibly, or even probably, it was."

It is respectfully submitted that jurisdiction should be declined because a Federal question of substance was neither presented to nor decided by the State Court, nor was a Federal question necessary to the determination of the cause.

II.

Motion to Dismiss and, in the Alternative, to Affirm.

Now comes the appellee, the Board of Education of the Town of West New York, by Saul Nemser, its counsel, and moves this Court to dismiss the appeal for want of jurisdiction; and in the alternative, said appellee moves to affirm the judgment of the New Jersey Court of Errors and Appeals as the Last Resort in all causes, upon the ground that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

The appellant cites cases bearing on the question of tenure rights which clearly involve unwarranted acts of school boards while a "Tenure Act" was in full force and effect; *without amendment or modification,* or which involve cases where teachers have made contributions to a

pension or retirement fund and, therefore, had acquired certain vested property rights in such fund, which, obviously, could not be diminished or disturbed to the prejudice of the contributors by subsequent legislation.

None of these cases are in point and fall far short of supporting appellant's position.

In none of these cases was the issue one which questions the right of the State to repeal, amend or modify its own laws. None of these cases have any relevancy to a situation where the State as the Sovereign power, modifies its own law—the Tenure Act—to affect salaries to accrue in the future—beginning with and during a new and subsequent school year.

The reduction in appellant's salary was 13% and became effective for the school year next following the date of the adoption of the resolution. The 1933 statute was enacted on February 4, 1933. The resolution reducing appellant's salary among others was adopted by the appellee on June 23, 1933, and became effective during the new fiscal year July 1, 1933-July 1, 1934. As a practical matter and due to the intervening summer vacation, appellant was not affected until school opened on September 1, 1933.

The action of the New Jersey Legislature in modifying the 1909 Tenure Act, for the limited period of one year, did not impinge upon any of the alleged rights of appellant.

"There can be no vested right in an existing law which precludes its change or repeal". 12 *C. J.* 958.

According to the New Jersey court's rational construction of the Tenure Act of 1909, it conferred upon the appellant and other school teachers of the State of New Jersey the right to be employed—after the expiration of a three year probationary period—during good behavior and efficiency without dismissal or reduction in salary, except for the causes enumerated in the statute. This conferred

upon appellant a *personal* right or privilege which he could neither assign nor transfer, and which the legislature could withdraw entirely or in part, as it pleased.

"The term 'vested rights' relates to property rights only and does not apply to personal rights". 12 *C. J.* 956.

Judge Cooley in his work on *Constitutional Limitations* (7th Ed.), page 402, states that citizens have no vested right in the existing general laws of the State which can preclude their amendment or repeal, and that there is no implied promise on the part of the State to protect its citizens against incidental injury occasioned by the changes in the law. See

People ex rel. Cunningham et al. v. *Roper et al*, 35 N. Y. 629;

People ex rel. Davies v. Commissioners of Taxes, 47 N. Y. 501;

Rector, etc., of Christ Church, Philadelphia, v. *County of Philadelphia*, 24 How. 300.

Appellant did nothing other than to accept another year's employment at the hands of the local Board of Education.

If the construction placed on the 1909 Act by the New Jersey court in the case at bar is to prevail, then clearly appellant has no contract and never had a contract in the full sense of the term. Thus a contractual *obligation* could not possibly be impaired and, therefore, a question could not possibly arise under the contract clause of the Federal Constitution.

At any rate, if appellant's contentions are tenable, and even if it be assumed that he acquired vested contractual rights under the Act of 1909 which the State was powerless to modify—still the 1933 statute constitutes proper emergency legislation.

The Preamble to the 1933 Statute proclaims the existence of an emergency. The Act is to be effective for one year—July 1, 1933 to July 1, 1934.

It is well-settled that the obligations of contracts must yield to the exercise of the police power reserved to the States.

Home Building & Loan Assn. v. *Blaisdell*, 290 U. S. 398.

Vested rights cannot inhibit the proper exertion of this power.

Nebbia v. *New York*, 291 U. S. 502.

Conclusion.

It is respectfully submitted that the appellee's motion to dismiss the appeal and, in the alternative, to affirm the judgment of the State court, should prevail.

REINHOLD HEKELER,
Attorney of Appellee.

SAUL NEMSER,
Of Counsel.